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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

ODESSA AYOUB, INDEPENDENT
EXECUTRIX OF THE ESTATE
OF ABDEL K. AYOUB

Petitioner,

v.

TEXAS A & M UNIVERSITY, *et al.*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in ruling that a public employee is not protected by the First Amendment during the time period in which the employee questioned or protested the existence of a two-tier pay system which discriminated against non-white, foreign-born citizens.

LIST OF PARTIES

1. Odessa Ayoub, Independent Executrix of the Estate of Abdel K. Ayoub

2. Law Firm of Hays & Anson

3. James W. Hill

4. Texas A & M University System

5. James C. Todd

6. Law Firm of Ramsey and Murray

7. John Murray

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in Ayoub v. Texas A & M Univ., et al., 927 F.2d 834 (5th Cir. 1991).

JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 1991. Rehearing was denied on April 24, 1991. App. A. On May 9, 1991, the mandate was stayed until June 8, 1991. App. E. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The First Amendment of the Constitution of the United States of America provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free

> exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment of the Constitution of the United States of America provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment of the Constitution of the United States of America provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the

> purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

This case concerns the efforts of Dr. A. K. Ayoub ("Ayoub"), an Egyptian-born, naturalized American citizen, to investigate and protest the pay system at Ayoub's place of employment at Texas A&M University.

In the early 1980's a controversy existed at Texas A&M University concerning the alleged existence of a two-tier pay system which discriminated against non-white, foreign-born professors. Dr. Ayoub was attracted to the controversy since Ayoub was a member of the class allegedly discriminated against by the disparate pay system.

Dr. Ayoub questioned and investigated the situation, seeking information from the administration relating to the disparate pay system. Dr. Ayoub's efforts were slowed in 1983 due to the consequences of Ayoub's fragile health. A severe heart attack coupled with insulin dependent diabetes prevented Dr. Ayoub from pursuing his quest until 1984. Dr. Ayoub's efforts to determine the existence of the two-tier system peaked in 1984 and 1985.

During 1984-1985, Dr. Ayoub questioned the administration concerning the two-tier system and its adverse effect on Ayoub's own salary. On October 16, 1984, the provost of Texas A&M University and Dr. Ayoub signed an agreement which provided for an informal arbitration of Dr. Ayoub's salary dispute. Dr. Ayoub, however, continued expressing his concerns about the two-tier system with the administration.

Dr. Ayoub was warned that his actions were considered disruptive by the University, but Dr. Ayoub failed to cease speaking out concerning pay disparity. In 1985, Dean Herbert H. Richardson, Associate Deans Carl Erdman, Leroy S. Fletcher and John Flipse, and Interim Department Head Jo Howze initiated a series of actions against Dr. Ayoub which included publicly questioning Ayoub's mental health and sanity, questioning Ayoub's colleagues concerning Ayoub's behavior and culminating in the moving of Dr. Ayoub's office from the building which housed the faculty staff for Dr. Ayoub's department to a building housing no teaching faculty and some distance from the classrooms assigned to Dr. Ayoub. Dr. Ayoub protested the move on the basis of his health and the detrimental effect upon his students. Dr. Ayoub's medical condition was well known to

the personnel at Texas A&M University. (Tr. Vol. 3, P. 195, lines 11-13). The move was protested by Dr. Ayoub's colleagues and investigated by a Faculty Senate subcommittee. Several months after the Faculty Senate subcommittee's investigation, the administration, upon the request of the subcommittee, returned Dr. Ayoub's possessions to Ayoub's original office. During this same period of 1984-1985, Dr. Ayoub received two merit raises and was nominated by the Interim Department Head, Dr. Jo Howze, for a major teaching award. The raises and nomination during 1984 and 1985 are puzzling since this was the time period in which Dr. Ayoub was described by Howze as being mentally unstable. (Tr. Vol. 1, P. 172, Line 4).

In September 1987, Dr. Ayoub filed suit pursuant to 42 U.S.C. § 1983 against the University and the five administrators, Flipse, Richardson, Erdman, Fletcher and Howze. Dr. Ayoub had previously filed an EEOC complaint in August 1987. On February 20, 1988, the EEOC granted Ayoub a "Right to Sue" letter. The day after the granting of Dr. Ayoub's "Right to Sue" letter, Dr. Ayoub died due to complications of his heart and diabetic conditions. The case proceeded to trial by Ayoub's executrix, Odessa Ayoub. At the close of Ayoub's evidence, the trial judge dismissed the

Title VII claim against Texas A&M University. The only issue which was presented to the jury was Dr. Ayoub's First Amendment retaliation claim. The jury found that each of the individual defendant administrators had punished Dr. Ayoub for exercising his constitutional right to protected free speech, and the jury awarded a total of $625,000.00 in compensation and punitive damages against the defendant administrators. Judge Black, the trial judge, subsequently entered a judgment notwithstanding the verdict for Defendants, holding that Dr. Ayoub's speech was not protected, that the Defendants were shielded by qualified immunity, and that the evidence did not support the verdict. Dr. Ayoub's estate timely appealed, and the appellate court upheld the trial court's ruling finding that Ayoub's speech involved only his personal situation and hence was not protected as a matter of public concern. The other issues raised by Ayoub on appeal were not addressed since all other issues were premised upon a finding that Dr. Ayoub's speech was a matter of public concern.

In analyzing Ayoub's speech, the appellate court cited the test stated in Connick v. Myers, 461 U.S. 138, 103 S.Ct.

1684, 1690, n. 7, 1692 n. 10, 75 L.Ed.2d 708 (1983).[1] Ayoub at 836. The Court found that Ayoub's speech did not address a matter of public concern due to the fact that Ayoub was concerned with his own compensation, Ayoub at 836; that Ayoub only complained about the system's application to Ayoub, Ayoub at 837; and that Ayoub did not air his complaints in a manner that would call the public's attention to the wrong. Ayoub at 837. The Court further found that there was no evidence that Dr. Ayoub had ever protested a system whereby foreign-born, non-white professors were paid less than white, native-born professors prior to Ayoub filing his EEOC complaint in 1987.[2]

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[1] "whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record."

[2] As explained in Petitioner/Appellant's Petition for Rehearing, the Court is in error on this point. Dr. Clinton Phillips, a witness for the defense and an administrative official, testified on direct examination by defense counsel that Ayoub had discussed the discriminatory two-tier system with Phillips in 1984 or 1985, some two to three years before the EEOC complaint.

The Court of Appeals denied rehearing on April 24, 1991. (App. D). The mandate was stayed until June 8, 1991. (App. E).

REASONS FOR GRANTING THE PETITION

This case presents three important questions concerning the First Amendment rights of a public employee. The first is whether or not an employee who complains or questions the existence of discriminatory pay system which personally affects the employee has addressed a matter of public concern protected by the First Amendment. The second issue is whether or not an employee must protest the effect of the discrimination upon other individuals similarly situated as the effected employee. Thirdly, whether or not the employee must complain or protest the discrimination in a manner designed to call the attention of the public to the discriminatory actions.

If left in place, the appellate court's decision will have an enormous adverse impact on the free speech rights of public employees. Employees could be punished for seeking information and complaining of discriminatory acts by public employers. Retaliatory actions, such as those taken by the administrators and described within these pleadings, would be allowable and unrestricted in their usage.

1. The first issue presented is the interrelationship between the employee's own concern and a matter of concern for the public. Ayoub's personal interest in the matter was his fear that he had been given a lower rate of pay due to his national origin. Ayoub discussed this concern with the administration and fellow faculty members. Due to Ayoub's untimely death, the triggering cause of Ayoub's concern is unknown; but it is well established in the trial evidence that other individuals were also questioning the University concerning disparate pay scales for foreign-born professors. (Defendant's Exhibit 42, see Ayoub's Charge Exhibits "A" & "D" and A & M's Response Attachments "B" & "C").[3] If individual citizens are not allowed to question the existence of discriminatory practices and then not allowed to pursue dialogue in an effort to effect change in order to eliminate the discrimination, First Amendment rights for individual citizens are meaningless.

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[3] Defense Exhibit 42 was admitted at the pre-trial conference. The docket sheet reflects that on January 26, 1990, Plaintiff and Defendants listed the exhibits sent back to the jury for deliberation. See Docket Sheet entry and Tr. Vol. 4, p. 53, lines 6-16.

The disparate pay structure which was challenged by Dr. Ayoub did not lend itself to easy analysis. Dr. Ayoub was concerned with a disparate pay scale directed at non-white, foreign-born citizen faculty. The salaries of individual professors were a matter of public record at the University. However, the status concerning white or non-white, foreign-born or nonforeign-born, and citizen or non-citizen, was not a matter of public record, and given the multi-ethnic composition of the United States in general and the diverse background of Texas A&M University in particular, Ayoub could not obtain the required data without the cooperation of the University administration. Ayoub could and did compare his own salary to the salaries of white, nonforeign-born, citizen faculty members.

The appellate court's decision is troubling in another aspect. Ayoub's speech, according to the appellate court, was not protected because Ayoub spoke out about the effect of the disparate pay system on himself and not others. It is clear, both from the lower court's opinion and the trial record, that Ayoub's complaint turned on his belief that he had been discriminated against due to his national origin, and that the discrimination was a result of a two-tier system.

The opinion, if left standing, would prevent an individual from speaking out against discrimination directed against himself, but would allow the individual to protest discrimination against other individuals. The decision is also silent on the number of individuals who must suffer discrimination before the discrimination becomes a matter of public concern. If Ayoub had protested or questioned the effect of the discriminatory pay system upon himself and one other non-white, foreign-born citizen professor, would it have been enough discrimination to have become a matter of public concern? Clearly the number of individuals affected or potentially affected by a discriminatory practice cannot be the controlling factor in determining whether or not speech is protected as addressing a matter of public concern. The language of Connick clearly contemplates that an individual may speak out on a matter in which the individual employee has a personal interest. Connick at 149. In Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979), this Court apparently assumed that an employee, whether alone or in a group, has the right to question the employer about work conditions "[a]ccepting that the Constitution guarantees workers the right individually or collectively to voice their views to their employers . . . ."

Babbitt at 2316.

A further case, worthy of note, which stresses the right of a public employee to speak freely on a manner of public concern is Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). McPherson's speech concerning her hope that an assassination attempt on the President's life would be successful was deemed by the Court of being worthy of First Amendment protection.

The content of the speech as reproduced and analyzed in the opinion revealed that McPherson was concerned with cutbacks in federal programs which she perceived to have an adverse impact on her race. Rankin at 381. The Court noted that McPherson was nineteen years old at the time the controversial statement was made. Rankin at 379. However, the Court did not consider for any purpose whether or not McPherson had a personal or financial interest in the programs cut back by the Reagan administration.

In the same fashion, a conversation which Ayoub had with the associate provost of Texas A&M University was examined during the trial. Dr. Phillips was Dean Richardson's superior. (Tr. Vol. 3, P. 175, Lines 18-21).

Ms. Malone: "Dr. Phillips, when did Dr. Ayoub talk to you about this two-tier system? Can you give me an approximate year."

Dr. Phillips: "In the -- probably '84, '85, in that year, maybe earlier; but as I said, my first introduction to him was over the fact that he was concerned about Bill Jones not teaching; and why, I'm not quite sure I know."

Transcript of trial proceedings, Volume 3, p. 178, lines 13-19.

Mr. Hill: "Did he ever discuss with you that there was a two-tier system regarding engineers whereby Texas A&M hired foreign-born individuals at a lower salary than native Americans?"

Dr. Phillips: "He alleged that, yes."

Transcript of trial proceedings, Volume 3, p. 177, lines 24-25; Volume 3, p. 178, lines 1-2.

The Court: "What was your response to his allegation that foreign-born professors are treated differently?"

The Witness: "I said that I knew of no evidence of that; that that certainly was not our policy; that we had a lot of foreign-born professors. And I could see no

> pattern that suggested that they were discriminated against in any way.
>
> If they earned different salaries, it was because of their productivity, not because of their origin or their color or religion or anything else."

Transcript of trial proceedings, Volume 3, p. 178, lines 24-25; Volume 3, p. 179, lines 1-8.

The testimony leaves no doubt that in 1984 or 1985 Dr. Ayoub was questioning the administration at Texas A&M University about a two-tier system which discriminated against foreign-born professors. Discrimination against even one individual cannot be tolerated in a freedom loving democracy. If Ayoub had been the only non-white, foreign-born professor at his place of employment, under the analysis presented by the appellate court, Ayoub still could not have protested or questioned the disparate pay system. This stifling of an individual's right to question whether or not the individual is a victim of discrimination is not beneficial in the formation and maintenance of a free society.

2. There is no requirement under existing case law that an individual must elect himself as a spokesman for an entire class before the individual's First Amendment rights "vest."

The First Amendment rights belong to the individual not the class. The rights of the individual are not forfeited simply because the conditions complained of effect the individual expressing his concern about the matter. Brawner v. City of Richardson, Texas, 855 F.2d 187, 192 (5th Cir. 1988), citing Connick, 461 U.S. at 149.

3. Under existing case law, there is no requirement that an individual voice his or her concern in a public forum. Givham v. Western Line Consol. School Dist., 439 U.S. 410, 415-416 (1979), made it quite clear that private criticism of the discriminatory practices of a public employer did not invalidate the First Amendment rights of the individual public employee.

> The First Amendment forbids abridgment of the "freedom of speech." Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.

The appellate court also noted that the subject matter of protected speech is a legal question to be determined by the court. Ayoub at 836. The trial court and reviewing court determined that an individual expressing concern about discriminatory practices directed at the individual was not expressing a matter protected by the individual's First Amendment rights. However, the factual issue concerning retaliation was submitted to the jury and the finders of fact held that Ayoub had been punished for speaking out on a matter of public concern. (App. C). If the Fifth Circuit opinion is allowed to stand, a public employer could punish an employee for speaking out on racial discrimination directed at the employee, and the employee would be without any safeguards or protection. An environment in which a public employee is unable to protest or question discriminatory practices is an environment hostile to the freedoms and rights which are the cornerstones of an independent and free society.

CONCLUSION

In summary, the lower court decision in the case at hand should be reversed and remanded. An individual public employee has protected free speech rights to voice concerns

about a disparate pay system which affects the employee's salary due to the employee's national origin.

DATED this 5th day of June, 1991.

Respectfully submitted,

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Odessa AYOUB, Independent Executrix of the Estate of Abdel K. Ayoub, Plaintiff-Appellant,

v.

TEXAS A & M UNIVERSITY, et al., Defendants-Appellees.

No. 90-2392.

United States Court of Appeals, Firth Circuit.

March 29, 1991.

Foreign-born professor brought action against university, alleging that his civil rights were violated and that his office was relocated in retaliation for his complaints about university's past discriminatory pay scale. Upon professor's death, action was pursued by executrix of his estate. The United States District Court for the Southern District of Texas, Norman W. Black, J., entered judgment for university, notwithstanding jury's verdict for executrix, and executrice appealed. The Court of appeals, E. Grady Jolly, Circuit Judge, held that professor's speech regarding salary disparity involved only his personal situation and hence was not protected as matter of public concern.

Affirmed.

1. Constitutional Law k. note 90.1(7.2)

Public employee, like any other citizen, has right to free and open debate, opinion, and expression, but when he speaks as employee on matters that address only his personal employment conditions, he is not protected from discharge by the First Amendment for engaging in that speech. U.S.C.A. Const.Amend.1.

2. Colleges and Universities k. note 8.1(1)

Constitutional Law k. note 90.1(7.2)

Foreign-born professor's speech regarding perceived salary disparity involved only his personal situation and hence was not protected by First Amendment as matter of public concern; even accepting professor's contention that his complaints were consistently expressed in terms of his being victim of pay system that discriminated on basis of national origin, indisputable facts found in record remained that professor consistently spoke not as citizen upon matters of public concern, but rather as employee upon matters of only personal interest. U.S.C.A. Const.Amend.1.

Appeal from the United States District court for the Southern District of Texas.

Before GOLDBERG, JOLLY, and WEINER, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this employment discrimination-first amendment case, Odessa Ayoub, the executrix of Dr. A.K. Ayoub's ("Ayoub") estate, appeals the district court's judgment notwithstanding the verdict entered in favor of the defendants, Texas A & M University (the "University"). Ayoub had sued the University and certain University officials alleging that his civil rights had been violated when his office was relocated in retaliation against his complaints about the University's past discriminatory pay scale. The district court determined that Ayoub's speech was not protected, that the defendants were shielded by qualified immunity, [*3028] that the evidence did not support the jury's verdict and entered a judgment N.O.V. We affirm the district court.

I

Ayoub, an Egyptian-born male, was hired by the University as a professor of Electrical Engineering in 1968. Among the faculty hired that year, the highest initial salary was paid to a foreign-born professor. In 1981, Ayoub filed a salary grievance with the University, complaining of his low starting salary in 1968, which he felt continued to disadvantage him. Thereafter, Ayoub complained on numerous occasions about the perceived salary disparity.

In the summer of 1984, shortly after becoming Interim Head of the Electrical Engineering Department, defendant Joe Howze ("Howze"), at the Dean's request, spent a week reviewing Ayoub's salary. Howze did not recommend an adjustment. In the summer of 1985, Howze reviewed all the salaries in the Department, recommending no raise for Ayoub

and four other white United States citizens. On July 29, 1985, Howze met with Ayoub. Two days later, Ayoub wrote to defendant Richardson, Dean of the College of Engineering, again raising the issue of his salary and complaining of Howze's failure to recommend him for a raise. At Richardson's request, defendant Associate Dean Fletcher reviewed Ayoub's salary. Fletcher concluded that Ayoub's salary was appropriate.

In the fall of 1985, defendant Erdman became Associate Dean of the College of Engineering. During the fall of 1985, Howze talked at one time or another with each of the other four defendants about Ayoub's disruptiveness. In response, Erdman began to investigate Howze's complaints about Ayoub. On November 12, 1985, Howze submitted his resignation as Department Chairman, allegedly because he no longer wanted to deal with Ayoub.

In late November 1985, Howze, Flipse, Erdman, and Fletcher discussed the possibility of moving Ayoub's office to another building, allegedly because of Ayoub's disruptiveness. Howze, as Department Head, was responsible for assigning offices within the total space allotted his department, while Flipse was responsible for allocating space within the College of Engineering. Flipse, who had apparently never met or spoken with Ayoub about the move, located a new office for Ayoub in another building. Fletcher arranged for a second parking space for Ayoub.

On December 9, 1985, Flipse wrote Ayoub, informing him he had been reassigned to a new office and asking him to return his present office keys by December 18. When Ayoub asked that the move be postponed until after finals and raised possible "unnecessary risks ... concerning [his]

health," Flipse postponed the move as requested. Subsequent to this letter, and prior to the move, Ayoub met with Richardson and Erdman to argue against the move, referring to his health problems.

In February 1986, the University "Faculty Senate" appointed a special subcommittee to investigate whether the Engineering Department followed the correct procedural steps before it moved Ayoub's office. The Faculty Senate mandated the committee from its inception to destroy all records after it presented its report. The committee's report, which was admitted into evidence over the University's objection, concluded that Ayoub had been denied "due process" when the administrators reached the decision to move his office without pri-[*3029]or notice to him. A few days after the committee's April 9, 1986 report, Richardson and Howze moved Ayoub back to his original office.

In September 1987, Ayoub sued the University and five of its administrators, Flipse, Richardson, Howze, Erdman, and Fletcher. Subsequently, in August of 1987, Ayoub filed a charge of discrimination with the Equal Employment Opportunity Commission. The EEOC granted Ayoub a "Right to Sue" on February 20, 1988.

Ayoub claimed the University retaliated against him for speaking out about an alleged salary disparity based on national origin by moving his office to another building.

Ayoub was apparently not in good health during this time period. He had suffered an insulin shock episode in 1983 and he had suffered a previous heart attack. In February 1988, Ayoub died as a result of a second heart

attack. His widow, as Independent Executrix of his estate, pursues this action.

II

Before trial, most of Ayoub's claims were dismissed except his Title VII claim for discrimination against the University and his retaliation claim against the five administrators. At the close of Ayoub's evidence, Judge Black dismissed the Title VII claim against the University. Ayoub dropped or the court dismissed Ayoub's other claims and the only issues that went to the jury was Ayoub's First Amendment retaliation claim. The jury found that each of these individual defendant administrators had punished Ayoub for exercising his constitutional right to protected free speech and awarded $625,000 in compensatory and punitive damages.[1] Judge Black subsequently entered a judgment notwithstanding the verdict for defendants, holding that Ayoub's speech was not protected, that the defendants were

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[1] The record is clear the Ayoub did not have his pay diminished nor was he discharged constructively or otherwise. There is no contention on appeal that Ayoub suffered actual discrimination in terms of pay on account of national origin or any other grounds, except at his initial hiring in 1968. The causal connection between Ayoub's damages and the defendants' conduct rests solely upon their decision to move his office to another building on campus. The record reflects that he was ultimately reinstated to his old office and that he never physically moved to his new office. Because of our disposition of the case, we do not have to get into the knotty questions presented by the jury's damage award.

shielded by qualified immunity, and that the evidence did not support the verdict. Ayoub's estate timely appeals.

III

A

Ayoub raises four issues on appeal, all challenging the district court's justification for granting the judgment N.O.V. Initially, Ayoub argues that the district court erred in granting the J.N.O.V. on his First Amendment claim because the evidence revealed that Ayoub was punished for speaking out against a matter of public concern, that is, pay disparity directed against the foreign-born professors. We find ourselves in agreement with the district court that Ayoub's speech involved only his personal situation and hence was not protected as a matter of public concern. Accordingly, [*3030] we need not address the other issues raised by Ayoub.[2]

Whether Ayoub's speech was addressed to a matter of "public concern" is a question of law. Terrell v. University of Texas System Police, 792 F.2d 1360, 1362 n. 2 (5th

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[2] The other issues that Ayoub raises on appeal all are premised upon a finding that his speech involved a matter of public concern and hence was protected under the First Amendment. Accordingly, his claims that the individual defendants were not protected by qualified immunity, that sufficient evidence supported the jury's verdict against the individual defendants for violating his First Amendment rights, and that sufficient evidence support the jury's award of damages, are all moot.

Cir.1982). Furthermore, "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 1690 & n. 7, 1692 n. 10, 75 L.Ed.2d 708 (1983). We will, therefore, make an independent review of the record to determine whether the district court properly resolved the question.

B

[1,2] In Connick, the Supreme Court held "that when a public employee speaks not as a citizen upon matter of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." 103 S.Ct. at 1690 (emphasis added). A public employee, like any other citizen, has a right to free and open debate, opinion and expression. However, when he speaks as an employee on matters that address only his personal employment conditions, he is not protected from discharge for engaging in that speech by the first amendment. This principle is especially compelling in cases where an employee's expressions are protected against retaliation under Title VII of the Civil Rights Act.

We recognized in Terrell that

> Because almost anything that occurs within a public agency could be of concern to the public, we do not focus on the inherent

> interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as a citizen or primarily in his role as employee. In making this determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.

792 F.2d at 1362. (citations omitted) In Terrell, we addressed whether the statements contained in a policeman's secret diary, which was critical of his supervisor and fell into the supervisor's hands, commented "upon matters of public concern." Id. at 1361. In holding that his diary could not serve as a basis for his First Amendment claim, we emphasized that he made no effort to communicate its contents to the public. Although the subject matter of the comments concerning the supervisor was arguably a matter of public concern, we concluded that Terrell's comments in the diary were those of an employee and not of a citizen, and hence not protected. Id. at 1361, 1362-62.

It is clear to us that Ayoub's speech did not involve a matter of public concern. Ayoub's complaints focused on his own indi-[*3031]vidual compensation. Only when his attorney filed the EEOC change did Ayoub characterize his complaint in terms of a 'two-tier' system, perpetuated by the University, whereby foreign-born professors were paid less than white, native-born professors. There is no evidence that Ayoub ever uttered such a protest at any time before the alleged retaliatory acts by the defendants. To the extent, however, that Ayoub may now couch his complaint in terms of a disparate "two-tier" pay system, the record is absolutely

clear that he only complained about its application to him. Ayoub's own witnesses stated that Ayoub's complaint was that his salary was not comparable with what he perceived to be his contribution to the University. One of his witnesses stated, "I came to understand that the nature of the original complaint was that he [Ayoub] felt that he had been hired at an artificially low salary; and he claimed that was based on his national origin." Another of his witnesses, Dr. Phillips, testified, "Well, his real complaint was about his own salary, we never talked about anybody else's." Ayoub argues, however, that his complaints were consistently expressed in terms of his being a victim of a pay system that discriminated on the basis of national origin. Accepting this contention, the indisputable facts found in the record remain that Ayoub consistently spoke not as a citizen upon matters of public concern, but rather as an employee upon matters of only personal interest. Certainly, Ayoub never attempted to air his complaints in a manner that would call the public's attention to the alleged wrong.

In sum, there is no evidence that Ayoub expressed concern about anything other than his own salary. Although pay discrimination based on national origin can be a matter of public concern, in the context in which is was presented in this case by Ayoub, it was a purely personal and private matter. As we found in Terrell, Ayoub was not retaliated against, if he was at all, "for speaking 'as a citizen upon matters of public concern,' or for 'speak[ing] out as a citizen on a matter of general concern, not tied to a personal employment dispute.'" 792 F.2d at 1363 (citations omitted)(emphasis in original).

VI

Accordingly, the district court's granting of the judgment notwithstanding the verdict is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ABDUL K. AYOUB,	§	
	§	
Plaintiff	§	
	§	
vs.	§	CIVIL ACTION
	§	NO. H-87-3009
	§	
TEXAS A&M UNIVERSITY, et al.,	§	
	§	
	§	
Defendants.	§	

ORDER

Plaintiff Odessa Ayoub is the widow of Abdul K. Ayoub who brought this case alleging various state and federal claims arising out of his treatment by officials of Texas A&M University.

At the close of the evidence, the Court granted Defendants' motion for directed verdict on all of Plaintiff's claims except for the First Amendment claims.

The jury returned a verdict against the individual Defendants in the amount of $50,000 each for violating Professor Ayoub's civil rights and in the amount of

$75,000 each as punitive damages for a total judgment of $650,000 against all Defendants.

Following close of the entire case, Defendants renewed their motion for directed verdict and, on February 5, 1990, filed a motion for judgment notwithstanding the verdict.

The evidence at trial was that Professor Ayoub had been an employee of the University for a number of years prior to his death. Throughout his career, he complained to all who would listen that his pay level was unreasonably low and, to some associates, he complained that his low pay was the result of his national origin.

Plaintiff's claim for damages was based on the fact that Professor Ayoub's office had been moved to a less convenient location as punishment for his speech about pay which was, to some of his superiors, disrupting his department. The evidence was that Professor Ayoub never personally moved to his new office and was ultimately allowed to return to his former space. A Faculty Senate subcommittee had found that the decision to move the office lacked "due process" because no hearing was held before the action was taken.

After considering all the evidence in the case in a light most favorable to Plaintiff, the Court grants Defendants' motion for judgment notwithstanding the verdict. Boeing v. Shipman, 411 F.2d 365 (5th Cir. 1969).

There was only a scintilla of evidence that Professor Ayoub ever spoke about any pay disparity against foreign-born professors. Rather, all the reasonable inferences to be adduced were that he was concerned only about his personal alleged pay disparity. Many of the higher paid employees in his department were foreign-born and, if Ayoub had a lower pay, the problem arose when he was hired some twenty years before suit was filed.

Professor Ayoub's complaints were not on matters of public concern, but only on matters of personal interest. Connick v. Myers, 461 U.S. 1684 (1983), Pickering v. Board of Education, 391 U.S. 563 (1968).

For further reason to grant Defendants' motion, the Court finds, as a matter of law, that those Defendants who ordered Professor Ayoub's move are protected by qualified immunity. Anderson v. Creighton, 107 S.Ct. 3034 (1987).

The jury totally disregarded the testimony in the case. By way of illustration, the evidence at trial was

that Defendant Fletcher's only participation in the move was to find a parking space for Professor Ayoub near his new office. Defendant Flipse's only involvement was in finding the office into which Professor Ayoub's property was moved. There is no evidence that Professor Ayoub complained to Defendants Richardson, Howze, or Erdman at all about being discriminated against because of his national origin.

There is no claim that Professor Ayoub's death was, in any way, caused by the alleged retaliatory conduct of Defendants. The only damage alleged is for the moved office. The jury award of $250,000 for actual damage was more than grossly excessive. It was totally unsupported by credible evidence.

There was no evidence of malice which would support any award of punitive damages. Smith v. Wade, 461 U.S. 30 (1983).

The judgment for Plaintiff is set aside and judgment is entered for Defendants.

Signed this 10th day of April, 1990 at Houston, Texas.

/s/
NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ABDEL K. AYOUB,	§	
	§	
Plaintiff	§	
	§	
vs.	§	CIVIL ACTION
	§	NO. H-87-3009
	§	
TEXAS A&M UNIVERSITY, et al.,	§	
	§	
	§	
Defendants.	§	

JURY VERDICT

SPECIAL INTERROGATORY NO. 1

Do you find from a preponderance of the evidence that Defendants, Mr. John E. Flipse, Dr. Herbert H. Richardson, Dr. Jo W. Howze, Dr. Carl A. Erdman and Dr. Leroy S. Fletcher, punished Dr. A. K. Ayoub for exercising his constitutional right to protected free speech?

ANSWER "yes" or "no" for each Defendant listed below.

Dr. Herbert H. Richardson	yes
Mr. John E. Flipse	yes
Dr. Carl A. Erdman	yes
Dr. Leroy S. Fletcher	yes
Dr. Jo W. Howze	yes

If you have answered "no" as to all Defendants to Interrogatory No. 1, do not answer any further Interrogatories. If you have answers "yes" as to any of the Defendants in Interrogatory No. 1, then answer the remaining Interrogatories only as to that Defendant or Defendants only.

SPECIAL INTERROGATORY NO. 2

What sum of money, if any, do you find from a preponderance of the evidence, would reasonably compensate Plaintiff for injuries or damages proximately caused by violations of Dr. A. K. Ayoub's civil rights for exercising his right to free speech?

ANSWER in dollars and cents or "none" for each Defendant listed below.

Dr. Herbert H. Richardson	$50,000.00
Mr. John E. Flipse	$50,000.00
Dr. Carl A. Erdman	$50,000.00
Dr. Leroy S. Fletcher	$50,000.00
Dr. Jo W. Howze	$50,000.00

SPECIAL INTERROGATORY NO. 3

Do you find from a preponderance of the evidence that the conduct of any of the Defendants listed below was a malicious or oppressive invasion of the rights of Dr. A. K. Ayoub calling for deterrence and punishment?

ANSWER "yes" or "no" for each Defendant listed below.

Dr. Herbert H. Richardson	yes
Mr. John E. Flipse	yes
Dr. Carl A. Erdman	yes
Dr. Leroy S. Fletcher	yes
Dr. Jo W. Howze	yes

SPECIAL INTERROGATORY NO. 4

What sum of money, if any, do you find from a preponderance of the evidence, that the Plaintiff should recover as punitive damages from each of the individual Defendants listed below?

ANSWER in dollars and cents or "none" for each Defendant listed below.

Dr. Herbert H. Richardson	$75,000.00
Mr. John E. Flipse	$75,000.00
Dr. Carl A. Erdman	$75,000.00
Dr. Leroy S. Fletcher	$75,000.00
Dr. Jo W. Howze	$75,000.00

January 26, 1990
DATE

/s/ Charles B. Dillon
FOREMAN

D-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2392

ODESSA AYOUB, Independent
Executrix of the Estate of
Abdel K. Ayoub,

Plaintiff-Appellant,

versus

TEXAS A & M UNIVERSITY,
ET AL.,

Defendant-Appellees.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(April 24, 1991)

Before GOLDBERG, JOLLY and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

TEL. 504/589-6514
600 CAMP STREET
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May 9, 1991

Mr. James W. Hill
Attorney at Law
P.O. Drawer 2949
Longview, TX 75606

NO. 90-2392 - AYOUB vs. TEXAS A & M
(DC NO. H 87 3009)

MANDATE STAYED TO AND
INCLUDING JUNE 8, 1991

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should not be made as a matter of course but only when the record is

deemed essential to a proper understanding of the case by that court.

A copy of the opinion, judgment, or Rule 47.6 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

/mc

By: /s/_____
Deputy Clerk

Enclosures

cc: Mr. James C. Todd

Supreme Court, U.S.
FILED
JUL 1 1991
OFFICE OF THE CLERK

(2)

* * * * * * * * * * *

NO. 90-1871

* * * * * * * * * * *

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1990

* * * * * * * * * * *

ODESSA AYOUB, INDEPENDENT EXECUTRIX
OF THE ESTATE OF ABDEL K. AYOUB
Petitioners

V.

TEXAS A & M UNIVERSITY, et al.
Respondents

* * * * * * * * * * *

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * * * * * * * * * *

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Executive Assistant Attorney General

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Research Attorney

JAMES C. TODD, Chief
General Litigation Division
State Bar No. 20094700
P.O. Box 12548
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Austin, Texas 78711-2548

COUNSEL OF RECORD

QUESTION PRESENTED

Whether the Court of Appeals erred in ruling that Petitioner's speech was not protected by the First Amendment.

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NO. 90-1871

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1990

* * * * * * * * * * *

ODESSA AYOUB, INDEPENDENT EXECUTRIX
OF THE ESTATE OF ABDEL K. AYOUB
Petitioners
V.
TEXAS A & M UNIVERSITY, et al.
Respondents

* * * * * * * * * * *

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * * * * * * * * * *

Respondents hereby file their brief in opposition to Petitioner's Writ of Certiorari to review of the United States Court of Appeals for the Fifth Circuit in this case.

STATEMENT OF FACTS

Dr. A.K. Ayoub was hired by Texas A&M University as a professor of electrical engineering in 1968. Among the faculty hired that year, the highest initial salary was paid to a foreign-born professor. *Ayoub v. Texas A&M University*, 927 F.2d 834 (5th Cir. 1991). Thirteen years later, in 1981, Petitioner filed a salary grievance with the University, complaining of his low starting salary in 1968 which he felt continued to disadvantage him. *Ayoub*, at 835. Thereafter, Petitioner complained on numerous occasions about the perceived salary disparity. Subsequently, his contention was that he had been hired at an inappropriately low salary in

1968 because of his foreign national origin. (Record Excerpt 94; (R.E. 94) Tr. 3-70.)

His complaints and behavior became disruptive over the years, although his salary received several comprehensive reviews. In response to complaints about his attitude and disruptions, he was reassigned to a larger office, with more windows, in another building. When Petitioner requested that the move be postponed until after finals and raised possible "unnecessary risks . . . concerning [his] health," the move was postponed. *Ayoub*, at 835. A faculty committee reviewed the move not as to "whether they were right in moving him but whether they followed the right steps" in doing so. (R.E. 11; Tr. 1-61.) The committee concluded the Petitioner had been denied due process because he had not received prior notice of the move. *Ayoub*, at 835-36. This finding was not based on any formal written rules and regulations. (R.E. 11; Tr. 1-61.) The Court of Appeals noted that Petitioner did not contend on appeal that he suffered actual discrimination in terms of pay, except at his 1968 hiring and that the conduct in question rested solely on the decision to move him. *Ayoub*, at 836 n.1. The court added that the record reflected that Petitioner was reinstated to his old office before he physically moved to the new one. *Id.*

Petitioner filed a charge with the Equal Employment Opportunity Commission (EEOC). At that time, the highest paid professor in the Electrical Engineering Department was foreign-born. (R.E. 126-140, 43-44, D. Exh. 16; Tr. 2-61-62.) Subsequently, he received a "Right to Sue" letter. *Ayoub*, at 836. Petitioner claimed the University moved his office in retaliation for speaking out about an alleged salary disparity based on national origin. *Ayoub*, at 836.

The trial court dismissed all of Petitioner's claims, including his Title VII claim, and allowed the First Amendment claim to go to the jury. *Ayoub*, at 836. The jury awarded $625,000.00 in compensatory and punitive damages.

Ayoub, at 836. U.S. District Judge Norman Black entered a judgment notwithstanding the verdict holding that Petitioner's speech was not protected, the Defendants' were shielded by qualified immunity and the evidence did not support the verdict. *Ayoub*, at 836.

On appeal, the Fifth Circuit affirmed the district court and found that Petitioner's "speech included only his personal situation and hence was not protected as a matter of public concern." *Ayoub*, at 836.

ARGUMENT

The Fifth Circuit below fully considered and correctly decided to affirm the District Court's ruling for several reasons. First, the Petitioner spoke only on a matter of personal interest, not public concern and therefore his speech was not protected by the First Amendment. Second, even if his speech contained a matter of public concern, the efficient administration of the academic department outweighed his free speech interest. In reaching its decision that Petitioner did not speak out on a matter of public concern, the Fifth Circuit followed a long line of unbroken authority. To grant a writ of certiorari on this matter would entail questioning the well-established First Amendment law created by this Court. In addition, a review of the "interest of efficient administration" would be fact intensive.

Petitioner argues that this case presents important questions concerning the First Amendment rights of a public employee:

> 1. Whether an employee who complains or questions the existence of a discriminatory system which personally affects the employee addresses a matter of public concern.

2. Whether the employee must protest the effect of the discrimination upon others.
3. Whether such protest must be made public.

Respondents contend that those questions have already been addressed by this Court many times. A more accurate interpretation of the facts in this case would leave one readily answerable issue: whether a professor who complains privately about his salary is protected by the First Amendment.

This court has clearly delineated the type of speech which is protected by the First Amendment. The First Amendment protects speech on a "matter of public concern," that is, speech which addresses a topic about which "debate is vital to informed decision-making by the electorate." *Pickering v. Board of Education*, 391 U.S. 563, 568, 571-72 (1968). By contrast, "when a public employee speaks not as citizen upon matters of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). (Emphasis added.) Whether Petitioners speech was a matter of "public concern", and therefore protected is a question of law for the Court. *Connick*, at 147-48; *Pickering*, at 568; *Terrell v. University of Texas System Police*, 792 F.2d 1360, 1361-62 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 948 (1987). To make this determination, the Court must examine the content, form, and context of the speech as revealed by the record as a whole. *Connick*, at 147-48. The Petitioner bears the burden of proof on this issue. *Rankin v. McPherson*, 483 U.S. 378 (1987); *Pickering*, at 568.

The Petitioner has failed to meet this burden. The content of Petitioner's speech related only to his personal interest and his salary. Petitioner does not allege that he spoke out concerning a two-tier payment system as it related to others. This would have been difficult to allege as no evidence was presented that such a "two-tier" system ever existed. The evidence showed that not a word of protest against this "two-tier system" was even uttered before the alleged retaliatory acts by the Respondents. *Ayoub*, at 837. Only when Petitioner's attorney filed his EEOC charge did the "two-tier system" concept and complaint appear. *Ayoub*, at 837. The Fifth Circuit found only a scintilla of evidence that Petitioner ever spoke about any pay disparity against foreign born professors, Petition for Writ of Certiorari, Fifth Circuit Order at B-3.

Instead the Fifth Circuit found only that Petitioner speech "involved only his personal situation and hence was not protected as a matter of public concern." *Ayoub*, at 836.

In his Writ for Certiorari, Petitioner quotes testimony concerning a conversation with Dr. Phillips to prove that Petitioner questioned this two-tier system which allegedly discriminated against foreign-born professors. A full disclosure of the record reflects that this conversation focused exclusively on the Petitioner's salary. Dr. Phillips explained that Petitioner's "complaint was about his own salary, not about [other's] . . . " (R.E. 100; Tr. 3-177.) On the next page, Phillips reiterated this point:

> Well, his real complaint was about his own salary. We never talked about anybody else's.

(R.E. 101; Tr. 3-178.)

No evidence indicates that Petitioner ever took up the cause of any other foreign-born professor or ever complained of another professor's salary but his own. As Petitioner

himself declared in a note to Defendants Richardson and Fletcher, "The issue is my own livelihood." (R.E. 119-120; P. Exh. 69.)

Even had the Petitioner a legitimate complaint about his salary, the Fifth Circuit correctly stated "if Ayoub had a lower pay, the problem arose when he was hired some twenty years before suit was filed," Petition for Writ of Certiorari, Fifth Circuit Order at B-3. Petitioner's exclusive focus on his own personal situation, with no reference to the plight of others in the relevant class (foreign-born faculty), is significant. Compare *Thomas v. Harris County*, 784 F.2d 648, 653 (5th Cir. 1986), in which the complaint "that a particular segment of the community is singled out for special treatment" by the police is distinguished from "remarks [that are] merely 'criticism directed at public officials' [which] constitute nothing more than complaints over internal police department affairs." Petitioner's speech more obviously fits the latter characterization than the former.

The form of his speech was "casual" and virtually indistinguishable from that of the typical faculty gripe about low pay "at any given time, in any given institution, in any given place." The context of Petitioner's speech further reinforces its purely personal nature. It is undisputed from the record that Petitioner communicated his complaints only internally, primarily within his department, and only to individuals who might have some control or influence with respect to his salary. No evidence indicates (and Petitioner does not claim) that at any relevant time Petitioner made his protest known even to other foreign-born victims of the alleged "two-tier system," much less to the faculty, the university community, or the public at large. See, *Ayoub*, at 837. As the Fifth Circuit correctly stated, the context in which Ayoub's speech was presented "was a purely personal and private matter." *Ayoub*, at 838. While rejecting the holding "that a public employee forfeits his protection against

governmental abridgement of freedom of speech if he decides to express his views privately rather than publicly," the Supreme Court went on to note that the interests of the employee "'in commenting on matters of public concern' must be balanced against the 'interest of the state as an employer in promoting the efficiency of the public services it performs through its employees.'" *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 414 (1979), quoting *Pickering*, at 568. "Private expression, however, may in some situations bring additional factors to the *Pickering* calculus." *Id.*, at 415 n. 4. When the speech is uttered publicly, content may outweigh context in the determination of whether the speech is protected; but with private expression the reverse may be the case. *Id.* When an employee confronts his immediate supervisor, the agency's institutional efficiency may be threatened not only by the content, but also by the "manner, time, and place in which it is delivered." *Id.*

Petitioner seeks to distinguish this case by citing several cases. A close scrutiny of these cases demonstrates that they are in agreement with *Connick* and its progeny. Petitioner cites *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979) for the proposition that workers may individually or collectively voice their views to their employees. *Babbitt*, at 313. This quote is accurate, however, the next sentence concludes the thought: "the Constitution does not afford such employees the right to compel employers to engage in a dialogue or even to listen." *Id.* This case is easily distinguishable from the instant case as it was brought by a union, not an individual. In *Babbitt* the United States Supreme Court decided that the question was not one of First Amendment, but rather of rights conferred by statute, *Id.*, at 313. Petitioner himself distinguishes *Rankin v. McPherson*, 483 U.S. 378 (1987); *Pickering*, at 568. As Petitioner states, the Court did not consider whether McPherson had a personal interest in the program cut back by the Reagan

administration. Petition for Writ of Certiorari, at 13. Rankin was discharged because in the context of a conversation about President Reagan's policies in which she said "shoot, if they go for him again, I hope they get him [referring to an attempted assassination]." *Rankin*, at 381-82. Clearly a conversation about Presidential policies and the life of the President are matters of public concern and cannot be compared to Petitioner's complaints about his salary.

An individual does have rights, but these must be tied to a matter of public concern. *Brawner v. City of Richardson, Texas*, 855 F.2d 187, 192 (5th Cir. 1988), concerns the discharge of an individual for sending a letter about misconduct of public officials to the police chief, mayor, city council members and newspaper reporters. Again unlike *Ayoub*, this case involved a matter of public concern which was published to the public. Petitioner cites *Givhan*, at 439 for the proposition that the matter of public concern need not be aired publicly. In *Givhan*, a teacher was dismissed for criticism to her superior of the school district's policies which she believed to be racially discriminatory. *Id.* , at 412-13. As previously noted in this brief, private expression may bring additional factors to the *Pickering* calculus, *Id.*, at 415 n. 4. When an immediate superior is confronted, the institutional efficiency may be threatened by the content of the message, and the manner, time and place in which it is delivered. *Id.*

Petitioner does not deny that his complaints created a disruptive atmosphere. In this regard, Petitioner's own evidence is illuminating. According to Plaintiff's witness Dr. Painter, Ayoub "was volatile, had a volatile personality." (R.E. 90; Tr. 3-54.) Another of Petitioner's witnesses, Dr. Kozik, testified:

> The next issue as to find out what the reasons were [for moving Dr. Ayoub's office]; and Dr. Ayoub claimed it was because he was

> criticizing the administration; but when I talked to some of his colleagues, I got different answers, depending on who I talked with. Some felt that he was obstreperous. Others had felt that he was causing disruption among the staff, in particular; whereas, others felt that was not the issue.

(R.E. 9; Tr. 1-59.)

Assuming arguendo that speech is determined to be protected (or to contain some element of public concern), the Court still must balance, as a question of law, the interest of the employee as a citizen against the interest of the public agency in promoting efficiency and harmony in the work place. *Connick*, at 147-48. To strike this balance, the Court must consider whether, *inter alia*, "the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin*, at 388, citing *Pickering*, at 570-73. The question to be decided, is whether the academic administrators' interest in department harmony outweighs Petitioner's interest in uttering the speech in question. Once the administrators' interest is held to prevail, the inquiry ends for the federal courts. It is not within the province of the court or jury to second-guess the administrators' discretionary judgment as to the nature and extent of the disruption, or the measures needed to restore, maintain, or promote harmony and efficiency. *Cf. Megill v. Board of Regents*, 541 F.2d 1073, 1077 (5th Cir. 1976) ("federal courts should be loathe to intrude into internal school affairs"), relying upon *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976) ("the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions"). Thus

the issues for the court are: 1) does the administrators' interest outweigh Petitioner in the relevant context, and 2) does any rational basis exist to support the administrators' assessment of Petitioner's disruptiveness?

Weighing on Petitioner's end of the scales is the minimal public interest element of his speech, as shown above. Tipping the balance is the inherently disharmonious nature of his speech, as shown even by his evidence. For a period of years, Petitioner complained incessantly to his superiors, including each new supervisor, (R.E. 88; Tr. 3-42), about his allegedly low salary. There is no doubt from the record that a number of Petitioner's colleagues did find his behavior and manner objectionable, including his constant complaining.

Clearly then, the administrators of the University's Electrical Engineering Department had some rational basis for concluding that Petitioner was disruptive and that some action needed to be taken. The decision to strike the balance in favor of Defendants' interest in departmental efficiency was amply supported. In a case directly on point, the Eleventh Circuit affirmed judgment n.o.v. in favor of state university officials who transferred five mechanical engineering professors to other departments and moved their offices after the latter sent a "self study" critical of their department to an accrediting agency. *Maples v. Martin*, 858 F.2d 1546 (11th Cir. 1988). If anything, the speech at issue in *Maples* was more a matter of public concern than Petitioner's, discussing systemic matters ("the critical need for new faulty, additional funding and more physical space, . . . the lack of faulty involvement in administrative decision-making . . . .") as opposed to the individual salary concerns of one professor. *Id.*, at 1549, 1553. Nevertheless, the court held that the administrative interest preponderated. While differences may be noted between the *Maples* speech and Petitioner's, as the determination is made case-by-case, some features of the former are useful for the

present analysis. The offending faculty comments "occur[red] in the context of a longstanding dispute," they "contributed to a lack of harmony among the faculty and interfered with the regular operation of the M.E. Department," and they "severely hampered communication between members of the faculty and the department head." *Id.*, at 1554. There simply can be no doubt that disharmony and hampered communication between other members of the faculty as well, if not all.

As demonstrated, although the question of whether speech is matter of public concern is one of law, the initial determination is also fact intensive. As in *Maples* the effect of the disruptiveness of the Petitioner's behavior on the department had to be determined. In *Maples*, the Eleventh Circuit examined memoranda, testimony as to personal confrontations, factionism and infighting, the "Review" prepared by the Plaintiffs, and the American Board of an Engineering and Technology's conclusions to reach the conclusion that the efficient administration of the department outweighed the free speech interest, *Maples*, at 1548-50. In *Ayoub*, the Fifth Circuit reviewed testimony concerning Ayoub's twenty years of salary complaints, his disruptive behavior and his EEOC complaint. *Ayoub*, at 835-37.

The District Court and the Court of Appeals reviewed this evidence and both courts came to the determination that the jury's verdict did not support the evidence. *Ayoub*, at 836; Petition for Writ of Certiorari, Fifth Circuit Order at B-3. The Fifth Circuit went as far as to say "the jury totally disregarded the testimony in the case." Petition for Writ of Certiorari, Fifth Circuit Order at B-3.

To review this case on writ of certiorari would again entail a review of the factual evidence.

CONCLUSION

In summary, Petition for Writ of Certiorari should be denied. The Fifth Circuit properly based its opinion on well-established United States Supreme Court authority. There is no conflict among the courts on this issue and the granting of writ of certiorari would not add anything new to the body of First amendment case law. In addition, a review of this case would be fact intensive.

Respectfully submitted,

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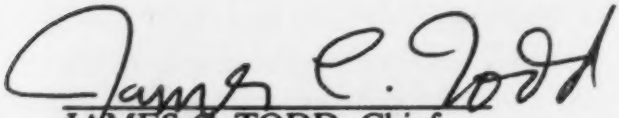

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested, on this the _____ day of _____, 1991, to:

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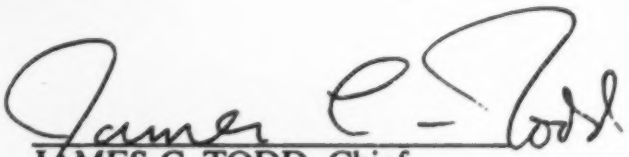

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